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Attorneys for United States Bureau of Reclamation

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
MEDFORD DIVISION

KLAMATH IRRIGATION DISTRICT,

Case No.:

Movant,

NOTICE OF REMOVAL

v.

**UNITED STATES BUREAU OF
RECLAMATION,**

Respondent.

TO: United States District Court for the District of Oregon

**Clerk of the Court,
Klamath County Circuit Court
316 Main Street
Klamath Falls, Oregon 97601**

**Nathan R. Rietmann
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Attorneys for Movant

PLEASE TAKE NOTICE that on this day Movant Klamath Irrigation District's ("KID") Emergency Motion for Preliminary Injunction, filed in **In re: Waters of the Klamath River Basin, Case No. WA1300001**, pending before the Circuit Court for the State of Oregon for the County of Klamath ("Klamath County Circuit Court"), is being removed to the United States District Court for the District of Oregon pursuant to 28 U.S.C. § 1442(a)(1) on behalf of the United States Department of the Interior, Bureau of Reclamation ("Reclamation"). Upon the direction of the Attorney General of the United States and pursuant to 28 United States Code Section 1446, the undersigned attorneys hereby state the following grounds for removal to the Judges of the District Court for the District of Oregon.

1. In re Waters of the Klamath River Basin (hereinafter "the Klamath Basin Adjudication" or "Adjudication") is a general stream adjudication of water rights in Oregon's Klamath River Basin. The Adjudication was commenced in 1975, and its administrative phase was conducted by Oregon Water Resources Department ("OWRD"). In 2014, OWRD concluded the administrative phase with the issuance of its Amended and Corrected Findings of Fact and Order of Determination ("ACFFOD"), which determines the rights and relative priorities of the numerous parties to the Adjudication during the pendency of the judicial phase of the Adjudication. The judicial phase is ongoing before the Klamath County Circuit Court.

The United States of America (on behalf of Reclamation and other agencies, as well as on behalf of the Klamath Tribes) has participated in both phases of the Adjudication, asserting claims to water rights, and objecting to the claims of others. KID has also participated in the Adjudication, as a claimant and as a member of the Klamath Project Water Users coalition that contested various federal law and state law water rights.

2. Separate from the Adjudication, the United States has also been party to numerous federal court cases and decisions over the past 20 or more years, including cases in which KID has been a party, challenging Reclamation's operation of the federal Klamath Project. These federal court cases have generally confirmed that Reclamation may, under federal law, limit diversions of water by Project irrigators (including those within KID) who hold junior, state-based water rights, in order to fulfill federal law obligations arising under the Endangered Species Act ("ESA") and senior federal reserved Tribal fishing and water rights. *See, e.g., Baley v. United States*, 942 F.3d 1312 (Fed. Cir. 2019); *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206 (9th Cir. 1999) ("Patterson"); *Kandra v. United States*, 145 F. Supp. 2d 1192 (D. Or. 2001) ("Kandra").

3. On March 29, 2021, KID filed an Emergency Motion for Preliminary Injunction ("Motion") in the Adjudication. Copies of the Motion, its supporting exhibits, and notice of appearance filed by KID's counsel are attached hereto as **Exhibit 1**. These filings constitute all of the process, pleadings, and orders served upon Reclamation in the Adjudication in connection with the Motion.

4. In its Motion, KID asks the Court to issue an order enjoining Reclamation from releasing water from Upper Klamath Lake (a naturally-occurring lake that Reclamation operates as part of the federal Klamath Project) to fulfill federal law obligations, including those arising under the ESA and senior federal reserved Tribal fishing and water rights, to the extent they

conflict with state-based water rights determined in the ACFFOD. KID asserts that Reclamation intends, commencing in mid-April, to make impermissible releases of water from the Upper Klamath Lake. Motion at 10-11. KID asserts that such releases will be made “for Reclamation’s own in-stream purposes to provide additional water for juvenile salmon.” *Id.* at 11. KID asserts that any such releases, which it alleges are inconsistent with terms of the ACFFOD, are impermissible under Oregon state law. Motion at 6 (citing ORS 539.170).

5. KID further asserts that such releases violate Reclamation’s obligations under federal law, specifically the Reclamation Act, 43 U.S.C. § 383, because the Act requires Reclamation to “act in accordance with state water law in the purchase, condemnation, ‘control, appropriation, use, or distribution of water.’” Motion at 22 (quoting *California v. United States*, 438 U.S. 645, 674-75 (1978) (“*California*”). Further, KID argues that releases for the benefit of listed salmonids cannot be justified under the ESA. Motion at 21-23. *See also id.* at 23 (“the ESA provides no basis for Reclamation to violate the ACFFOD.”).

6. KID’s Motion is properly removable to this Court. 28 U.S.C. § 1442(a)(1) allows for the removal to federal court of “[a] civil action or criminal prosecution” against “[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States.” *Stirling v. Minasian*, 955 F.3d 795, 797 (9th Cir. 2020). Here, the motion for preliminary injunction was brought against Reclamation, an agency of the United States. *State of Neb. ex rel. Dept. of Soc. Services v. Bentson*, 146 F.3d 676, 678 (9th Cir. 1998) (“Since this case was brought against an agency of the United States, it was removable under § 1442 as amended.”).

7. KID’s Motion constitutes a “civil action” for purposes of 28 U.S.C. § 1442(a)(1). 28 U.S.C. § 1442(d) defines the term “civil action” as including “any proceeding (whether or not

ancillary to another proceeding) to the extent that in such proceeding a judicial order . . . is sought or issued.” A motion which seeks a “judicial order” against a federal officer or agency constitutes a “civil action” and thus is removable under 28 U.S.C. § 1442(a). *See Goncalves v. Rady Children’s Hosp. San Diego*, 865 F.3d 1237, 1250 (9th Cir. 2017) (holding that a “motion to expunge [a] lien is a proceeding in which ‘a judicial order . . . is sought,’” and therefore removable under 28 U.S.C. § 1442(a)(1)); *see also Hammer v. U.S. Dept. of Health & Human Servs.*, 905 F.3d 517, 527 (7th Cir. 2018) (holding that a motion seeking declaratory relief against a federal agency in state proceeding “is an “ancillary proceeding” and, therefore, a “civil action” within the plain text of § 1442.”).

8. KID’s Motion expressly raises contested issues of federal law material to the resolution of its Motion. KID seeks to enjoin releases by Reclamation that KID contends are in violation of Reclamation’s obligations under federal law, specifically the Reclamation Act, 43 U.S.C. § 383. Motion at 22 (quoting *California*, 438 U.S. at 674-75). Moreover, KID argues at length that such releases cannot be justified under the ESA, and that the ESA would not provide Reclamation with a defense against the relief sought in KID’s Motion. Motion at 21-23. KID also asserts that Reclamation uses stored water in the Upper Klamath Lake to fulfill trust obligations it has to the Hoopa Valley and Yurok Tribes related to their reserved water rights. *Id.* at 23. As a matter of federal law, Reclamation must operate the Klamath Project in accordance with senior federal reserved Tribal fishing and water rights in the Klamath Basin, which federal courts have held take precedence over more junior, state-based irrigation rights in the Basin. *See, e.g., Patterson*, 204 F.3d at 1214; *Kandra*, 145 F. Supp. 2d at 1204. Further, Reclamation intends to assert defenses under federal law to the Motion, including the lack of a waiver of sovereign immunity.

9. A copy of this Notice of Removal is being filed with the Clerk of the Klamath

County Circuit Court. This filing will automatically effect the removal of KID's Motion in its entirety to this Court for all future proceedings pursuant to 28 U.S.C. § 1446(d). However, this removal is limited to the Motion and proceedings related to it, and not the Adjudication as a whole. *See* 28 U.S.C. § 1442(d)(1) (authorizing removal limited to the proceeding for which there is a basis for removal).

By filing this Notice of Removal, Reclamation does not waive any legal or factual defenses in this matter and expressly reserves the right to raise any and all legal or factual defenses in subsequent pleadings in this Court.

Respectfully submitted this 5th day of April, 2021.

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s/ Thomas K. Snodgrass

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CERTIFICATE OF SERVICE

I certify that on April 5th, 2021, the foregoing was electronically filed with the Court's electronic filing system, and additionally, a copy was provided by email to:

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